

IN THE SUPREME COURT OF THE STATE OF ALASKA

ELIZABETH CARR, RACHEL
BERNGARTT, KELSEY CROFT,
ALEX ENGERISER, CHRISTINA
LOWRY, ANNA MARQUEZ, AND
KYLE ROBERSON,

Supreme Court No. S-17852

APPLICANTS,

V.

ALASKA BAR ASSOCIATION,

RESPONDENT.

**ALASKA BAR ASSOCIATION'S RESPONSE TO ORIGINAL
APPLICATION FOR RELIEF**

INTRODUCTION

Seven applicants ("Petitioners") for the September 2020 Alaska bar examination ("bar exam" or "exam") have filed an Original Application, petitioning this Court to amend the Alaska Bar Rules and grant diploma privilege to first-time applicants due to the coronavirus pandemic.¹ In essence, they are requesting that they become fully licensed to practice law in Alaska without ever sitting for a bar exam, based on proof that they received a diploma from their law school. The Court has asked for a response from the Alaska Bar Association ("the Bar") and, thus, the Bar

¹ An eighth applicant filed a Motion to Withdraw as an applicant after the initial filing and is no longer a party to this Original Application.

respectfully responds herein. As explained below, because exempting certain bar applicants from taking a competency exam poses an unreasonable risk of harm to the public and the legal system, the Board of Governors of the Alaska Bar Association (“Board”) opposes the grant of permanent diploma privilege.

In the alternative, the Petitioners have asked to cancel the in-person examination and order the Bar to administer a remote examination. Because of the complications in administering such a remote exam in a safe and secure manner, and other reasons explained below, the Bar also opposes that request.

1. Modifications of July Bar Exam Due to COVID-19

Both the Bar Association and this Court recognized very quickly that the coronavirus pandemic raised potential health and safety concerns for administering the bar exam at the customary time and in the ordinary manner. As a result, on April 1, 2020, the Board held a special meeting via conference call to discuss requesting permission from the Supreme Court to postpone the July exam.² At the conclusion of that special meeting, the Board requested that this Court temporarily suspend the dates and deadlines in Bar Rules 3(1), (3) and (6), which would permit

² <https://alaskabar.org/for-lawyers/board-of-governors/meetingsagendasaction/>.

the Bar to postpone the July exam and set a future date at the Board's discretion. On April 7, 2020, this Court issued SCO 1958 doing just that.³ After coordination with the National Conference of Bar Examiners ("NCBE"), the Board determined that administering the exam on September 9 and 10, 2020, was the best option to provide the shortest delay for applicants.⁴

When determining the best approach to this extraordinary situation, the Bar and the Board were concerned about public health and safety, but also the importance of protecting the public from prospective attorneys who have not passed the long-established competency examination required of all attorneys in Alaska. As a UBE state, Alaska does not administer its own exam, but administers an exam created by NCBE that provides successful applicants with a transferable score that can gain them admission in other UBE jurisdictions without the necessity of taking a separate bar exam in those states. In order to protect new attorneys from a lengthy delay in receiving the results of the bar exam, the Board chose the earliest option available to it from NCBE, which was six weeks after the original July dates. The Bar also has plans to strive

³ Alaska Supreme Court, SCO 1958.

⁴ NCBE offered two alternative dates for in-person exams – September 9-10 or September 30-October 1.

to score the exam and release the results on a shorter schedule than usual, if at all possible.

In addition, after some correspondence with this Court, the Board held another special meeting on July 8, 2020, to consider whether or not diploma privilege should be an option, in light of the concerns some applicants might have of taking an in-person exam.⁵ At that meeting, the Board unanimously agreed that diploma privilege was not something that was appropriate for Alaska, but decided that an expansion of Bar Rule 44 – the legal intern permit rule – would provide an alternative option for recent law school graduates to begin practicing law. Upon invitation of the Court, the Bar then proposed amendments to Bar Rule 44 that created a new category of practice – referred to as a “supervised practitioner.”⁶ After considering the proposal, this Court adopted SCO 1963 on August 12, 2020, amending Bar Rule 44, and making it effective immediately. Law school graduates who meet the requirements of the amended rule are now permitted to practice law for up to 12 months as “supervised practitioners.” As explained in more detail below in section 7, while this requires them to have a supervising attorney, the rule

⁵ <https://alaskabar.org/wp-content/uploads/July-2020-BOG-Special-Meeting.pdf>.

⁶ <https://alaskabar.org/wp-content/uploads/BOG-Special-Meeting-Convention.pdf>.

otherwise permits supervised practitioners to practice law as if they were fully licensed. Each of the first-time applicants for the September bar exam are eligible to immediately begin practice under the provisions of Bar Rule 44.

2. Brief History of the Bar Examination in Alaska

Alaska has administered a bar examination as a prerequisite to practicing law here for more than 50 years. Until July 2014, the Alaska Bar Association administered an exam with either essay questions used for the California bar exam or its own essays created by the Law Examiners Committee, combined with the NCBE multistate bar exam questions.⁷ Since 2014, Alaska has administered the Uniform Bar Examination (UBE) that is wholly created by NCBE.

Other than Wisconsin, which permits graduates of the two in-state law schools to be admitted without examination (“diploma privilege”), all other jurisdictions in the United States require that a person pass a bar exam prior to becoming licensed to practice law. As discussed further below, in light of the current pandemic, only four states – Louisiana, Oregon, Utah and Washington – have decided to grant diploma privilege, each applying different criteria to those eligible for admission in that

⁷ *Sullivan v. Alaska Bar Ass'n*, 551 P.2d 531, 535 n. 11 (Alaska 1976).

manner. To date, 12 states have officially declined to grant diploma privilege when petitioned to do so.⁸

The Alaska Bar Rules govern the admission to practice law in Alaska. Specifically, Alaska Bar Rule 5 provides, in pertinent part:

Section 1. (a) To be admitted to the practice of law in Alaska, an applicant must: (1) pass the bar examination prescribed pursuant to Rule 4; be excused from taking the bar examination under Rule 2, Section 2; or transfer a UBE scaled score of 280 or above achieved on a UBE administered in another state, territory, or the District of Columbia within five years preceding the date of the application to the Alaska Bar Association....

Bar Rule 4 provides, in pertinent part:

Section 1. An applicant shall be allowed to take the bar examination once the applicant's application is approved by the board....

Section 2. If an application is approved by the board, the applicant shall submit to a bar examination. The bar examination ... shall be written, and shall be conducted in the manner and at the time and place established by the board.

⁸ <https://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/> (Alaska is listed on this website along with those 12 states because of this Court's earlier communication with the Bar Association, indicating that the Court was not in favor of diploma privilege at that time).

The Bar has administered two exams per year since at least the early 1970s. Bar Rule 3 was amended in 1981 to specifically provide that “[b]ar examinations shall be held in the months of February and July of each calendar year.”⁹ Results for the exams are traditionally released at the May meeting of the Board of Governors for the February exam and at the October meeting for the July exam. Thus, the earliest a spring graduate from law school could be licensed to practice law in Alaska is generally mid-to-late-October. With the postponement of the July exam this year, the Bar anticipates holding a special Board meeting in November to approve and release the results of the September 2020 exam. Thus, under the current plan, the results will be released approximately one month later than in previous years.

As this Court has previously stated: “we shall continue to defer to the administrative expertise of the Bar Association and Board of Governors with respect to admission procedures except in cases where a majority of the court is convinced that the interests of justice compel us to intercede.”¹⁰ Similarly, the Court has noted: “While this court ultimately reserves the authority to determine whether or not an

⁹ Alaska Supreme Court, SCO 473.

¹⁰ *Sullivan*, *supra* at 536.

applicant should be admitted to the bar, considerable administrative responsibility has been delegated to the Alaska Bar Association.”¹¹

3. Details of Administration of September 2020 Bar Exam

The Bar Association has spent considerable time preparing to safely administer the upcoming exam to all applicants. The Petitioners refer to a warning from public health officials to younger people that “now is not the time to be crowding together – especially not indoors.”¹² The Bar certainly has no plans of “crowding” applicants together. The Bar is following municipal guidelines regarding face masks, group size and social distancing for the exam. While it is true that younger people have been a major part of the recent surge in cases in Alaska, there is nothing to indicate that the surge was related to closely-monitored events, where masks were mandatory, talking was prohibited, and numerous precautions were taken to comply with health mandates. The bar exam cannot be compared to restaurants, bars or social events such as backyard barbeques, where there is mingling among the participants and where participants will necessarily be removing their masks to eat or

¹¹ *Application of Peterson*, 499 P.2d 304, 306 (Alaska 1972).

¹² *Original Application* at p. 7.

drink. Applicants at the exam will be required to distance at all times, remain silent and wear masks throughout their time at the Sheraton.

Currently, there are 58 applicants scheduled to take the bar exam in Anchorage. One of those applicants will not be taking the exam with the others, as that person has been granted special accommodations due to a disability, pursuant to Bar Rule 4(2). Three applicants are scheduled to take the exam in Fairbanks and one in Juneau. All of the Petitioners herein applied to take the exam in Anchorage.

Recognizing the concerns related to the pandemic, rather than utilizing the ordinary testing site that the Bar has used for several years, the Bar reserved the ballroom at the Sheraton Hotel, to guarantee more space. That ballroom will be divided into three sections, with no more than 12 applicants in any section. The Bar has also reserved the Kuskokwim Room at the Sheraton, which will be divided into two rooms, with no more than eight applicants in each. In addition, the Susitna room has been reserved and will have no more than eight applicants.¹³ The Bar has acknowledged the health and safety concerns and government advisories and has modified the location plan multiple times

¹³ See Attachment 1, Sheraton Hotel seating charts, with distances indicated.

since the spring of 2020. The Bar is, by no means, proceeding with “business as usual” and dismissing the concerns raised by the coronavirus pandemic.

Moreover, as shown on Attachment 1, within these multiple separate rooms, the applicants will be seated more than the minimum six feet apart as required by the Municipality of Anchorage and recommended by the Center for Disease Control and other health agencies. Prior to being admitted to the test site, applicants will be required to comply with all State of Alaska travel mandates and sign an Agreement and Declaration affirming that they are not exhibiting any symptoms of COVID-19, have not tested positive for COVID-19 or have obtained medical clearance after an earlier positive test. Applicants, proctors and staff will be required to wear masks at all times. Including proctors, the most people in one room will be 13. Check-in and start times will be staggered among six groups of applicants, with two check-in tables, so that a maximum of six, and as few as four applicants will check-in at a table at a time, and they will be socially distanced while doing so, with markings on the floor to indicate the appropriate spacing. Applicants will then be required to go directly to their assigned table and wait there. Applicants will not be permitted to mingle or interact in common areas. Hand sanitizer will be provided at all tables. Test materials will

be placed in envelopes several days before the exam, sealed, with the applicants' names on them, and placed on the assigned tables before the applicants arrive. Once testing begins, talking among applicants will be prohibited. Applicants will use the same table each day of the exam. At the end of each session, the applicants will be dismissed by rows to maintain distancing.

4. Twenty-four Jurisdictions Administered In-Person Exams in July

On July 27 & 28, 2020, 24 jurisdictions went forward with in-person bar exams with applicant numbers far larger than scheduled to take the exam in Anchorage. Five states, including Alaska, will administer in-person exams on September 9 & 10; three states will administer in-person exams on September 30 & October 1. Seven of the July administrators will offer a second in-person exam in September. Three of the four states – Oregon, Utah and Washington – that recently adopted diploma privilege have or will administer an in-person exam to those applicants who are ineligible for diploma privilege or who want a portable UBE score.¹⁴ In sum, at current count, there will be 42 in-person exams administered across the country.

¹⁴ The fourth state, Louisiana, is offering two remote, one-day, exams for applicants not eligible for the diploma privilege.
https://www.lasc.org/COVID19/Orders/2020-08-12_LASC_BarExam.pdf

To date, the Bar is only aware of the report of one applicant in Colorado – mentioned by the Petitioners at page 15 – who sat for the bar exam and learned she was positive for COVID-19 on the day she completed the exam. That applicant was tested the day before the exam because of a scheduled surgery on the Friday after the exam.¹⁵ According to news reports, she spent “over 16 hours in a classroom with about 20 others” and the Colorado Department of Public Health and Environment determined that the other applicants did not need to quarantine or get tested because all applicants wore masks and maintained six-foot distancing.¹⁶ The executive director of the Bar contacted Colorado on August 18, 2020 and was informed that they were not aware of any other applicants in Colorado who tested positive. Moreover, none of the 23 other jurisdictions has reported that any of its applicants contracted COVID-19 in connection with taking the in-person bar exam in July.

5. Twelve Other Courts Have Denied Diploma Privilege

In the last several months, twelve other state courts have formally denied similar requests for diploma privilege.¹⁷ As mentioned above, only four states granted a new diploma privilege. The Alaska Board of

¹⁵ <https://coloradosun.com/2020/07/30/colorado-bar-exam-law-students-coronavirus/>.

¹⁶ *Id.*

¹⁷ <https://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/>.

Governors was asked by this Court to provide its thoughts on diploma privilege back in July and, after a special meeting, voted unanimously to reject the concept. At that time, this Court indicated that it was not inclined to grant diploma privilege.

The purpose of the bar exam is to ensure minimum competence of those admitted to the practice of law. The Bar and Court have an ongoing obligation to protect the public and the integrity of the profession from lawyers that are not qualified to practice law. “Diploma privilege removes the public protection function vested in the court and places it with the law schools, but with no independent, vetted, objective or consistent final check on whether graduates are in fact competent to provide legal services.”¹⁸ As pointed out by NCBE, allowing law schools to essentially decide who is qualified to practice law adds a highly subjective component to the decision to grant a permanent license to practice law to an applicant. Each law school and each professor within a law school may grade their students very differently. Law schools provide a service to their students, most of whom have paid a tremendous amount of tuition, and have an interest in seeing their graduates authorized to

¹⁸ *Bar Admissions During the COVID-19 Pandemic: Evaluating Options for the Class of 2020*, National Conference of Bar Examiners, available at: <https://www.ncbex.org/pdfviewer/?file=percent2Fdmsdocumentpercent2F239>

practice law. But few, if any, law schools have all their graduates pass the bar exam on the first attempt.

The bar exam is a licensure exam and is meant to objectively apply consistent standards to all those seeking to practice law in a given jurisdiction. As discussed in more detail below, Alaska has specifically chosen to require a high passing score in order to be sure to protect the public from unqualified lawyers. And, it is important to note that nearly every person who has failed the Alaska bar exam was a graduate of an ABA-accredited law school. Yet, the request herein by the Petitioners would grant a license to practice law to every first-time applicant, based solely on that graduation.

In Montana, a state where diploma privilege was permitted until 1983, the Supreme Court recently denied a petition requesting diploma privilege for 2020 law school graduates.¹⁹ In doing so, the Montana court quoted from its original decision to eliminate diploma privilege:

There must be a balance between serving society and the fact that the law has obtained a complexity in modern times which is just a little too much for the ordinary citizen to assimilate in its totality. When we accept this rationale, there is obvious reason and purpose in evaluating

¹⁹ *In re Rules for Admission to the Bar of Montana*, AF 11-0244 (July 14, 2020), available at: <https://juddocumentservice.mt.gov/getDocByCTrackId?DocId=321470>.

competency through the use of more rigid and uniform minimum requirements for admission to the profession, and this will be done in the public interest.²⁰

In reaching that decision in 1980, the Montana court also expressed concern that diploma privilege was “outdated and inadequate” to serve the needs of the legal system and that “[i]t necessarily follows that the public is not being properly protected.”²¹

The Nebraska Supreme Court also recently denied a request for emergency diploma privilege, noting “[w]e agree with our colleagues in Missouri who recently denied a similar petition and balanced the needs of this year’s law school graduates with the ongoing obligation to protect the public and the integrity of the profession through oversight of the profession and its practitioners.”²² In explaining that decision, the Nebraska court mentioned the pass rates for the Nebraska exam (63 percent overall and 72.2 percent for graduates of Nebraska law schools) and found “[g]ranted the diploma privilege would place the public at risk

²⁰ *Id.* at 4 (quoting *In re Proposed Amendments Concerning Bar Examination*, 609 P.2d 263, 265 (Montana 1980).

²¹ *Id.* at 265.

²² *In Re Petition for Waiver of the Bar Examination Requirement for Admission to the Bar and Provision of Emergency Diploma Privilege*, Order S-20-0495, p. 3 (Nebraska Supreme Court, July 13, 2020), available at:

<https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F272>.

from lawyers who did not meet the minimum qualifications.”²³ As a result, Nebraska decided it would continue with plans to administer two in-person exams – one in July and one in September.

In a letter to members of the Idaho State Bar, Chief Justice Burdick of the Idaho Supreme Court announced that Idaho rejected a request for diploma privilege, noting “[w]hile we recognize that COVID-19 has placed applicants in a difficult position, we will not compromise the standards we have set for admission to the bar.”²⁴ The chief justice continued: “[a]s the professional licensure exam for lawyers, the bar exam helps ensure the professional integrity and competence of the legal profession, creating a standard that informs and protects both the attorneys operating in our state and the clients who retain their services.”²⁵

Similarly, Missouri rejected diploma privilege, noting that it would not adequately “ensure the core function of licensure, which is to protect the integrity of the profession and the public from those who have not demonstrated minimum competency to practice law.”²⁶

²³ *Id.* at p. 3.

²⁴ *Letter to Members of the Idaho State Bar from Chief Justice Roger Burdick*, July 20, 2020, available at: <https://isc.idaho.gov/files/bar-exam.pdf>.

²⁵ *Id.*

²⁶ *Clerk of the Supreme Court of Missouri Betsy AuBuchon Statement Regarding July Bar Examination*, July 9, 2020, available at: <https://www.courts.mo.gov/page.jsp?id=161854>.

As noted, the Alaska Bar’s position is the same – that granting a diploma privilege would place the public at risk from lawyers who did not demonstrate minimal competency. Largely absent from the original application is any explanation of how diploma privilege will adequately protect the public from lawyers who, despite a law degree, lack the baseline competency to practice law. Nor does it adequately explain why persons who graduated from law school in December 2019 or later, should be permanently admitted without ever having to pass any bar exam. The Bar understands that all applicants for every bar exam want to practice law because of employment offers, career goals and outstanding student loans. In recognition of the concerns raised by the pandemic, the Bar sought to provide an alternative to applicants and, working with the Court, created an amendment to Bar Rule 44 that permits all first-time applicants to begin practicing as supervised practitioners. See section 7, infra.

When deciding whether to grant a diploma privilege, it is important to consider the ramifications of doing so. Alaska has intentionally set a high minimum “cut score” – a scaled score of 280 – to pass the Alaska bar exam, in order to ensure that Alaska attorneys are competent and their clients are protected.²⁷ Moreover, the passage rate for Alaska’s exam

²⁷ Bar Rule 4(6).

is relatively low in most years. For example, the pass rate for the most recent, February 2020 exam was 47 percent overall and 59 percent for first-time applicants. In July 2019, the passage rate was 56 percent overall and 64 percent for first-time takers. Since the UBE was adopted by the Court, effective with the July 2014 exam, the pass rate has had a high of 77 percent overall (February 2016) with a high for first-time applicants of 86 percent (same year) and a low of 38 percent overall (February 2019) with a low for first-time applicants of 58 percent (July 2016). Overall, on UBE exams administered in Alaska since 2014, the first-time applicants' passage rate was under 60 percent on three occasions, exactly 60 percent on one occasion, between 64-67 percent on three occasions and over 75 percent on four occasions, two of which were over 80 percent. Thus, seven out of the past eleven exams administered resulted in first-time applicants' passage rates of less than 67 percent. Considering those past performances, admitting applicants via a diploma privilege would mean that between 15 and 40-plus percent of the applicants admitted will likely not have the minimum competency to practice law under the standards Alaska has used for at least 50 years to admit lawyers to the bar.

Also worth considering is that some of the first-time applicants that failed recent bar exams received scores that were not even close to the

required scaled score of 280. In February 2020, one first-time applicant scored 229. In July of 2019, a first-time applicant received a score of 215. And in February of 2019, a first-time applicant scored 236. Each of these individuals graduated from law school. Had they done so in 2020, granting a diploma privilege would permanently admit each one of them to the practice of law. There are no guarantees that similar first-time applicants are not scheduled to take the September exam. This demonstrates the danger of the diploma privilege option – there is a risk of admitting individuals who are clearly not able to competently practice law, when utilizing the standard for admission that has been used for decades.

Although the Petitioners may be well aware of this, a lawyer that gains a license to practice law via diploma privilege would gain local admission only. These lawyers would not have the benefit of earning a portable UBE score and it is very unlikely they would be eligible for reciprocity admission in other states in the future. While some individuals may decide to take that risk and accept diploma privilege there may be others that want to take an in-person exam to acquire that portable UBE score.²⁸ In addition, there are re-applicants that would not

²⁸ There are seven applicants listed on the caption of this case, but the Bar is aware that at least three other applicants are supportive of a diploma privilege. There are a total of 53 first-time applicants registered

be eligible for a diploma privilege. As a result, the Bar would still be required to administer an in-person exam. If it is safe enough to do so for any applicants, as the Bar believes it is, then it is safe enough to administer it to all applicants.

6. A Remote Examination is Not Feasible for Alaska

The Petitioners have suggested, as an alternative to granting diploma privilege, that this Court cancel the in-person administration of the bar exam and order that it be conducted remotely. If a remote exam was administered, it would not provide a portable score, certainly with most jurisdictions. Several states, though not all, are agreeing to reciprocal admission for applicants who take the remote NCBE exam. As a result, if this Court were to cancel the in-person exam, there may be many applicants who would be deprived of an opportunity to gain that portable UBE score that they want to be able to gain admission in other jurisdictions. If the Court, instead, ordered that the Bar administer both in-person and remote exams, that would raise additional problems for the Bar that would not be easily surmountable.

Alaska is a small state in terms of the number of people who sit for the bar exam in a given year and in terms of the staff who administer the

for the September exam, many of whom may desire a portable UBE score.

bar exam. If two exams are given, grading those would also become difficult. Not only would the admissions staff of two people have to administer two exams, but the Law Examiners Committee would have to grade two different exams.

While it is true that a number of states decided early on to administer a remote exam, the Bar and Board decided not to do so. Some of the states are using their own essay questions, and others are using an abbreviated exam provided by NCBE, which is, in essence, “half of a bar exam.” NCBE has only agreed to provide the test questions and will not provide scoring services, requiring each state to be responsible for scoring their own exam and interpreting applicant performance. Properly scaling and objectively scoring an exam administered to only a small number of people in Alaska would be a complicated task and there is a risk that errors would be made.

Moreover, the Petitioners correctly point out many of the concerns with remote exams. The first three states to administer remote bar exams – Michigan, Indiana and Nevada – had delayed starts, with up to one to two weeks delay for the latter two states. Florida just this past week notified applicants three days before the scheduled start of the exam that

it was cancelling the online test and hoping to reschedule it in October.²⁹ To try to provide some relief to the applicants who were surprised by the last-minute cancellation, Florida announced it was developing a “supervised practice program.”³⁰ Similarly, Indiana made a late decision to change the format of its remote exam drastically and, after initially postponing it for one week, decided to email questions to the applicants with deadlines for turning in the answers and did not even attempt to remotely proctor the exam due to software issues.³¹ That was possible, however, because Indiana used its own exam questions, and not Multistate Essay Exam (MEE) questions provided by NCBE.

Unlike some other states, Alaska does not have a bank of essay questions “ready to go” that could be used to administer its own essay exam. The Law Examiners Committee has not drafted essay questions since February 2014, and most of the current committee members have never drafted an essay question. Asking the Bar to administer an online exam of its own at this stage would likely require a greater delay in administering the test and, thus, a greater delay in applicants receiving the results. Instead of releasing the results for the in-person exam in mid-

²⁹ <https://news.bloomberglaw.com/business-and-practice/florida-scrap-online-bar-exam-amid-growing-technology-concerns>.

³⁰ *Id.*

³¹ <https://www.in.gov/judiciary/files/order-other-2020-20S-CB-300b.pdf>.

to-late November, the results of a remote exam may not be released until late 2020, or even early 2021, considering the potential difficulty in finding volunteer committee members who would be available to grade the exams during the holiday season.

Remote testing with an electronic proctor also poses security risks that cannot be completely mitigated. It raises potential technology concerns because applicants would need a stable internet connection and a quiet room to be uninterrupted for several hours. The Alaska Bar Association cannot control the environment for these factors. Applicants who take the exam in more rural areas are more likely to have connectivity issues. Just as technical difficulties are not uncommon, remote testing also raises issues related to equity, accommodations and privacy.

Most of the states which are offering the NCBE remote exam on October 5 & 6, 2020, have been planning to offer a remote exam for several months already. These states have had time to investigate the issues regarding technology and scoring the exam. The Bar staff would have less than six weeks to figure out how to do something it has never done before, dealing with both the technology issues and the issues of how scoring would be done. The Bar is not confident that, with the Executive Director being a part-time admissions administrator, it would

have resolved all the issues and procedures, and be ready to administer the NCBE remote exam on October 5 & 6.

Almost all of the states offering the remote exam are larger population states (or bordering states), which normally test hundreds, or even thousands, of applicants. It is much more difficult, if not impossible, for these large states to have adequate testing space to accommodate individual distancing. In those instances, the remote exam was a more feasible option than in-person administration. Alaska, like other small population states, is able to provide adequate space to allow more than the minimum social distancing.

For all of these reasons, the Bar asks the Court not to order a remote exam and to allow it to continue with the safe plan to administer the in-person exam.

7. Alaska Bar Rule 44

As mentioned above, on August 12, 2020, this Court amended Alaska Bar Rule 44 and created a new alternative for applicants like the Petitioners. A “supervised practitioner” now has the ability to practice law in essentially the same way that employees of the Department of Law, Public Defender Agency or Office of Public Advocacy currently practice law under AS 08.08.210(d) (the “10-month-rule”).

In the Original Application, the Petitioners downplay this amendment to Bar Rule 44 which would essentially allow all first-time applicants to fully practice law. Petitioners speculate that employers will not hire or equally pay someone working under Bar Rule 44, but there is no real support for that argument. The 10-month rule has been utilized for decades by the Department of Law, the Public Defender Agency and the Office of Public Advocacy. Many attorneys begin their work for those agencies prior to taking the bar exam, are paid as if they were licensed and often are given time off to study.

It is true that a supervised practitioner, like almost all brand new attorneys, will require that an attorney supervise them, but they will otherwise be permitted to practice law – appear in court, draft and sign pleadings, take on new clients, draft contracts, etcetera – just as if they had passed the bar exam. While the Petitioners claim that this response is inadequate, in light of the pandemic, at least twenty-five states have expanded or adopted temporary practice rules to permit graduates to work under the supervision of a licensed attorney until they are able to take the bar exam.³² These states made these changes to address the fact that the COVID-19 pandemic has complicated the normal

³² <https://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/status-table/>.

administration of bar exams and decided to offer alternative options to applicants that did not want to sit for the exam due to health and safety concerns. The reasons the Bar Association recommended the amendments to Bar Rule 44 were the same. The Bar Association recognized the concerns of applicants and moved to provide another alternative for them and this Court agreed. Petitioners seem to dismiss this option without justification.

8. The Bar has offered to allow applicants to delay the exam

Finally, all applicants have also been offered the opportunity to withdraw from the September 2020 exam, and either receive a full refund of exam fees, or to transfer their application to a future exam. While delaying the exam, or practicing as a supervised practitioner may not be perfect solutions, applicants are not without alternatives to sitting for the September bar exam. The Bar has done what was feasible to accommodate the concerns raised by the pandemic, but cannot, like the Idaho court noted, “compromise the standards we have set for admission to the bar.” The role the Bar and Court play in protecting the public and the integrity of the profession is too important to dismiss, even in this tremendously difficult time for the applicants and all citizens of our state, our country and the world.

CONCLUSION

For all of the reasons discussed above, the Alaska Bar Association asks this Court to allow it to administer the admissions process as it has done effectively for so many years. The protection of the public and the integrity of the profession remain critical, even during this public health crisis. The Bar has taken extensive measures to prepare a safe in-person exam and to provide reasonable alternatives to applicants. As a result, the Bar recommends that the Court deny the request for diploma privilege and also the alternative request to hold a remote exam.

DATED this 20th day of August, 2020 at Anchorage, Alaska.

/S/ Philip E. Shanahan
Philip E. Shanahan
Alaska Bar #9406046
Bar Counsel

Certification

I certify that the primary text of this document was prepared with 13 point Bookman Old Style Font.

/s/ Philip E. Shanahan
Philip E. Shanahan

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